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FILED
JUN 26 2006
OFFICE OF THE CLERK

No. 05-1462

IN THE

Supreme Court of the United States

CITY OF SANTA CLARITA,

Petitioner,

v.

COUNTY OF LOS ANGELES, CEMEX, INC., and UNITED STATES BUREAU OF LAND MANAGEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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June 26, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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ARGUMENT

The first observation to be made about the Brief in Opposition to Petition for Certiorari (Opp.) is the nearly complete absence of any defense of the rule of law raised in the Petition for Writ of Certiorari (Petn.), the rule upon which the judgment below rests. Respondent Cemex, Inc. (Cemex) offers nary a word on behalf of the practice of bilateral settlements of trilateral disputes. Rather than defending the abrogation of the rights of Petitioner City of Santa Clarita (Santa Clarita), Cemex fabricates a claim that Santa Clarita was granted limited intervention and suggests that there is some uncertainty whether Santa Clarita's rights may yet survive. Rather than refuting Santa Clarita's demonstration that such bilateral settlements are now widely used to terminate the rights of nonconsenting parties, Cemex confirms and celebrates the practice. Rather than defending the Ninth Circuit's erroneous review and affirmance of the consent decree under the standard for reviewing class-action settlements challenged by dissident class members, Cemex simply recites that the Court of Appeals did so.

Cemex's acknowledgment of the widespread practice of bilateral settlements of trilateral disputes is also a complete answer to the objection that this case is not certiorari-worthy because it is not a published decision. The Ninth Circuit's memorandum disposition confirms the commonplace—but not universal—assumption that *Firefighters v. Cleveland*, 478 U.S. 501 (1986), sanctioned the sweeping use of consent decrees to which intervenors do not consent, consigning the practice to a netherworld of unpublished decisions in which rights die without consent and without adjudication. This intolerable practice will not be constrained unless and until this Court addresses it. Santa Clarita submits that this is the appropriate case for that review.

I. The Question Was Properly Presented Below

Cemex would have this Court believe that Santa Clarita did not present the issue raised in its Petition to the courts below. Opp. i, 11, 12. That is absolutely false. The issue, whether a court may approve a consent decree that disposes of an intervenor as of right's properly presented claims over the intervenor's objection, was raised at every level of this litigation. The issue was briefed to the District Court, including citations to *Firefighters* as well as *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (CA5 1993) and to *United States v. City of Miami*, 664 F.2d 435 (CA5 1981). See Opp. 12, n.5; App. I-7-8. And the issue dominated the proceedings in the Ninth Circuit, where over three-quarters of the oral argument was devoted to the rights of nonconsenting intervenor Santa Clarita and to the effects of the consent decree on its rights.[1] There can be no doubt that the question Santa Clarita presents here was both "raised [and] resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (emphasizing the practical flexibility of the standard).

A close reading of Cemex's brief reveals that it does not claim otherwise. Rather, Cemex complains that Santa Clarita did not assert below *the conflict in the circuits* over the interpretation of *Firefighters*. Opp. i, 11, 12. That, of course, is irrelevant—such conflict is of little interest to district courts or even circuit courts, which want simply to

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[1]The recording of the full oral argument is available on the Ninth Circuit's website at http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1. Whether a nonconsenting intervenor could even appeal from entry of the consent decree, under what standard that appeal would be reviewed, and the effects on the nonconsenting party were argued from 1:01 to 28:10, from 33:35 to 34:15, and from 36:48 to 47:12, a total of 38 of the 49 minutes of argument.

know what their own circuit authority says, but is of great importance to this Court. What Santa Clarita *did* assert below, and what the Ninth Circuit clearly understood to be at issue, was that a district court may not enter a consent decree over the objections of a nonconsenting intervenor as of right whose claims in the action were being abrogated by the decree. Differences in emphasis and detail in the briefing below are neither surprising nor significant to the exercise of certiorari jurisdiction. *Cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion). The question presented here was undeniably presented below.

II. Santa Clarita Was Granted the Full Rights of an Intervenor as of Right, Including the Right to Have Its Validly-Raised Claims Adjudicated on the Merits

Rather than confront the trilateral dispute squarely presented by this case, Cemex instead suggests that Santa Clarita's rights as an intervenor were somehow limited. Opp. 22-24. This argument is both factually and legally incorrect.

Cemex contends that Santa Clarita "was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of Cemex's complaint." Opp. 24. Cemex purports to find this restriction in the Ninth Circuit's 2004 order granting Santa Clarita leave to intervene. Yet the Ninth Circuit's order contains no such limitation. Instead, the Court found that "[t]he City has a protectable interest in upholding the County's application of [the California Environmental Quality Act (CEQA)] against Cemex's allegations of abuse

of process and federal preemption." App. B-6.[2]

Cemex misreads the Ninth Circuit's intervention decision to somehow grant Santa Clarita less than full intervenor rights. Cemex is misreading the specific grounds said by that Court to satisfy the interest requirement of Federal Rule of Civil Procedure 24(a) as a limitation on Santa Clarita's rights.[3] The scope of the intervenor's rights is defined by the "practical . . . ability to protect [its] interest." Rule 24(a). Plainly the ability to challenge termination of the CEQA process was practically necessary to protect Santa

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[2]The Circuit's instruction that Santa Clarita may not "reopen any issues already decided in this case," App. B-9, is not a limitation on Santa Clarita's rights as an intervenor, but a general statement of intervention law. *E.g.*, *Arizona v. California*, 460 U.S. 605, 615 (1983) ("Of course, permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration."); *Cerro Metal Products v. Marshall*, 620 F.2d 964, 969-970 (CA3 1980) (similar language did not prevent intervenor as of right from appealing trial court ruling). The intervention decision confirms that while Santa Clarita could not reopen decided issues in the District Court, it was given full rights "to appeal the approval" of the consent decree, App. B-9, which necessarily includes review of any and all rulings underlying the decree.

[3]Indeed, courts and commentators disagree as to whether limitations *may* lawfully be imposed on an intervenor as of right. It is well-settled that the court may limit the participation of a permissive intervenor. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 381-382 & n.1 (1987) (Brennan, J., concurring) (discussing difference between permissive intervention and intervention as of right). But there are substantial doubts whether such restrictions on an intervenor as of right are permissible. See, *e.g.*, *id.* at 382, n.1 ("a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor"); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469-470 (CA4 1992) (intervenor as of right could not be denied opportunity to conduct pretrial discovery); 7C C. Wright & A. Miller, Federal Practice and Procedure § 1922 (2d ed. 2006 Supp.).

Clarita's CEQA interests. Moreover, Cemex's fictitious claim that the City "was limited to arguing legal claims or defenses directly challenging the Consent Decree itself, but not relating to the underlying merits of Cemex's complaint," Opp. 24, betrays a fundamental misunderstanding of the law of intervention. Rule 24(c) required Santa Clarita, an intervenor-defendant, to file an answer "setting forth the . . . defense for which intervention [wa]s sought." The answer necessarily relates "to the underlying merits of Cemex's complaint" by raising valid defenses to the complaint, and the District Court was bound to permit Santa Clarita to litigate the defenses on their merits.

III. Cemex's Argument That the Case is "Unripe" Is Wrong and an Instructive Example of the Bait-and-Switch Stratagem Routinely Employed to Insulate Such Consent Decrees from Judicial Examination

Santa Clarita pointed out that the practice of approving consent decrees without a party's consent often depends on a superficial analysis of the decree's effects, deferring determination whether the objecting party has lost rights until after the decree has been approved. Petn. 22. Rather than disputing the point, Cemex has chosen to illustrate it.

Cemex tells the Court that "Santa Clarita has other litigation currently pending—including two other Ninth Circuit appeals and a U.S. District Court CEQA action" and promises that "[t]he extent to which the Consent Decree has collateral impact on these other cases will be determined in the first instance in these other pending cases." Opp. 11. The fact that Santa Clarita may have rights arising under other statutes is, of course, utterly irrelevant to the consent decree's termination of its rights under CEQA. And those rights have unquestionably been abrogated by the decree. By ordering

the County of Los Angeles to terminate its CEQA review, App. C-69, 80, by prohibiting any future CEQA review, App. C-71-73, 80, and by ordering issuance of the permits that CEQA says must be preceded by environmental review, App. C-76-79, 81, the consent decree leaves Santa Clarita no rights under the statute.

Santa Clarita's rights under CEQA embraced both the right to consult with the County as it carried out its duties and the right to challenge its final action in court if that action failed to comply with state law. Cal. Pub. Res. Code Ann. §§ 21153(a), 21168 (West Supp. 2006). Cemex argues that Santa Clarita did consult with the County. Opp. 3, 20. But that was not a one-time right. Absent the consent decree, there would have been further proceedings, for which Santa Clarita enjoyed a continuing right of consultation, followed, if necessary, by judicial review of the County's actions under the state law. Had prior consultations satisfied these rights, the Court of Appeals would not have recognized Santa Clarita's right of intervention in the ongoing litigation. Indeed, that Court recognized in 2004 that the practical effect of granting the relief requested by Cemex would be to "vitiate the City's right to consultation under CEQA." App. B-8.[4]

Cemex is reprising precisely the bait-and-switch sales pitch consenting parties often employ to overcome the objections of nonconsenting parties: suggesting at the time the decree is entered that its effects on those parties are innocuous or unclear, then, once the decree is entered, citing

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[4]Cemex's claim that this case somehow does not present a trilateral dispute is based on the argument that the consent decree only affects the signatories to the settlement. Opp. 22, n.10. Cemex makes it clear that its position is based on a steadfast refusal to recognize the practical impact of the decree. *Ibid.* ("the Consent Decree concludes the CEQA process, and[,] in doing so, was found not to impact Santa Clarita's right of consultation").

it to show that those same parties have no rights left. See Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 119. The lower courts' ratification of that process here is emblematic of the superficial analysis that has infected the consent-decree jurisprudence and the manifest injustice it has wrought.

As it happens, Cemex has obligingly provided refutation of its own ripeness argument. Cemex affirmatively states that the consent decree "concludes the CEQA process," Opp. 22, n.10, and that the District Court has already reached a ruling on the merits of Santa Clarita's CEQA claim, *id.* 27, in the course of the "fairness" hearing, *ibid.* Cemex cannot now be heard to say that there is any uncertainty regarding Santa Clarita's remaining CEQA rights.

IV. That *Firefighters* Has Spawned Confusion Regarding the Rights of Nonconsenting Parties Is Manifest from the Case Law and Vividly Illustrated by This Case

Santa Clarita laid out for the Court the conflicting and confused law on bilateral consent decrees in trilateral disputes. Petn. 18-19. Cemex denies that there is any conflict or confusion. Opp. 15-17. Cemex is wrong.

First, Cemex attempts to dismiss three of the cases—*Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (CA2 1983), *United States v. City of Miami*, 664 F.2d 435, and *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (CA5 1977)—on the ground that *Firefighters* postdates them. Opp. 16. In fact, *Firefighters* not only postdates the three, it cites them with approval. See 478 U.S. at 518, 529. Cemex cannot say that *Firefighters* overruled the three cases; on the contrary, all three have been widely cited and followed since 1986. They remain

conflicting, confusing landmarks on the consent-decree terrain.

Cemex's main tool to conceal the conflict in the remaining cases is the same superficial wording the cases themselves use to paper over the disparate outcomes. According to Cemex, the Rosetta Stone of the consent-decree-without-consent cases is whether "the consent decree would adversely affect legal rights." Opp. 16. That merely relabels the issue. The fact remains that the courts of appeals conflict over what legal rights may be abrogated by a consent decree to which a party does not consent. Perhaps the most clear example of that conflict is whether an intervenor union's rights arising out of a collective bargaining agreement may be abrogated by a bilateral consent decree to which it has not consented. The Fifth and Eleventh Circuits have said in *United States v. City of Hialeah*, 140 F.3d 968, 976-978, 983 (CA11 1998) and *City of Miami*, 664 F.2d, at 442, 447 (Rubin, J.) that the union's rights may not be abridged. The Tenth Circuit rejected the union's request for protection from a consent decree the union claimed conflicted with its contract. *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1107-1108 (CA10 2004).

The ineluctable fact remains that the circuits differ on when an intervenor's legal interest is sufficient that it must be protected from a consent decree to which it has not consented. The Fifth Circuit and the Eleventh Circuit (following Fifth Circuit law) are more protective of intervenors' rights in *City of Miami*, *Wheeler*, and *City of Hialeah*. The First, Second, Seventh, and Ninth are less protective in *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275 (CA1 2000), *Kirkland*, 711 F.2d 1117, *Ragsdale v. Turnock*, 941 F.2d 501 (CA7 1991), and *Southern California Edison Co. v. Lynch*, 307 F.3d 794

(CA9 2002)[5]. And the Tenth Circuit goes both ways. Compare *Johnson* with *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389 (CA10 1986).[6]

The confusion lies not only in determination of what rights of an intervenor must be protected but in the procedure to which the intervenor is entitled. Cemex's alternative justification for the abrogation of Santa Clarita's rights is that the District Court actually gave Santa Clarita an adjudication of its rights—in the "fairness hearing" on the consent decree. Opp. 26-27. If this strange proposition—that the Court took Santa Clarita's motion for summary judgment off-calendar to rule on the consent decree but in effect granted Cemex summary judgment against Santa Clarita— is true, it was not apparent to the Ninth Circuit. That Court explicitly approved the consent decree without reaching the merits. App. A-2

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[5]Cemex appears to agree that *Edison* reads *Firefighters* to say that an intervenor-*defendant* can never save its defenses from abrogation by consent decree. Opp. 17. Santa Clarita submits that this is a clear misreading of *Firefighters* and an example of the mischief being wrought by the circuits' construction of that case.

[6]Cemex's brief places *Johnson* in both the Tenth and Eleventh Circuits. Opp. 18. It comes out of the Tenth Circuit. Cemex can cite no case from the Eleventh Circuit that conflicts with the cases cited above.

Johnson's explanation for the conflict is that in *Sanguine* the objecting intervenors had been denied intervention in a decision that was reversed on appeal and that by the time the intervenors returned to the District Court the consent decree had already been entered, which the Court of Appeals reversed to permit them to oppose the decree. *Johnson*, 393 F.3d at 1108-1109. That explanation highlights another source of confusion in the law that Santa Clarita had pointed out, Petn. 9-10, and Cemex does not address: Under *Martin v. Wilks*, 490 U.S. 755 (1989), the belated intervenor in *Sanguine* would be free to bring a collateral attack on the consent decree precisely because it was not a party, but not if it were an intervenor over whose objections the decree had been entered.

("The whole point of a consent decree is that the court need not adjudicate the merits."). And if that is what the District Court did, then, as Santa Clarita has pointed out, Petn. 16, the expedient of the "fairness hearing" reversed the standard of review from de novo review with all inferences favoring Santa Clarita to abuse-of-discretion review with all inferences favoring Cemex. No district court should be permitted to grant summary judgment in the guise of a "fairness" finding and, in doing so, to invert the standard for appellate review.

This confusion of standards and procedures is endemic to the post-*Firefighters* law of consent decrees. The conclusory treatment of intervenors' rights, the ad hoc pastiche of procedures, and the misguided standard of review that confuses the nonconsenting intervenors' rights with those of a dissident class member confirm the need for this Court to restore due process to the consent-decree jurisprudence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 26, 2006